IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
WRIT PETITION NO.1956 OF 2006

1. Hotel Sahara Star
   Sahara Hospitality Ltd.,
   formerly known as Batra Hospitality Pvt.Ltd.
   A company registered uder the Companies
   Act, 1956 having its Registered Office at
   Sahara India Point, CTS No.40/44,S.V. Road,
   Goregaon West), Mumbai-400 104.

2. Vivek Kumar, .. Petitioners
   The Assistant Director and Principal Officer
   of the Petitioner No.1, having his office at
   Hotel Sahara Star, Domestic Airport,
   Vile-Parle (East), Mumbai-400 099.

v/s.

1. The State of Maharashtra
   through Principal Secretary,a
   Urban Development Ministry,
   Manatralaya, Mumbai-400 032.

2. Municipal Corporation of Greater Mumbai,
   a Statutory Corporation Constituted under
   the Mumbai Municipal Corporation Act, 1888,
   having its office at Municipal Head Office
   Building, Mahapalika Marg,
   Mumbai-400 001.

3. The Municipal Commissioner of Municipal
   Corporation of Greater Mumbai, having
   his office at Municipal Head Office
   Building, 1st Floor, Mahapalika Marg,
   Mumbai- 400 001. .. Respondents

Mr.K.K. Singhvi, senior counsel with Mr. T.N. Subraniam, senior counsel, Mr. D. Mehta, Mr. P.Jaiswal, Mr. A. Mehta, Ms. Sushma

Joshi i/by Mr. Haresh Mehta & Co.for the petitioner.

Mr. Ravi Kadam, Advocate General with Mr. V.R. Dhond & Mr. K.R. Belosey, Government Pleader for the respondent No.1.

Mr. C.U. Singh, senior counsel with Mr. V. Mahadik for the respondent Nos.2 and 3.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,
JJ.

DATE OF RESERVING THE JUDGMENT : 21ST DECEMBER, 2006

DATE OF PRONOUNCING THE JUDGMENT : 30TH MARCH, 2007

JUDGMENT (Per F.I. Rebello, J.)

Rule. Heard forthwith.

2. The petitioners are aggrieved by communication dated 8th September, 2006 whereby the petitioners' application for grant of additional FSI on CTS No.2085 of Santacruz (West) domestic airport for a five star hotel, has been rejected. The petitioners are a company incorporated under the Indian Companies Act and have a hotel in the name and style of Hotel Sahara Star. The petitioners are also challenging the issuance of the two impugned notices viz. one under section 354-A of the MMC Act and another under section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 (Hereinafter referred to as the M.R.T.P. Act). In so far as the notice under section 354-A of the MMC Act and the notice under section 53 of the M.R.T.P. Act are concerned, their legality presently is not being considered as the petitioners by their application dated 26th May, 2005 have applied for regularisation under section 44 of the M.R.T.P. Act, 1966.

3. The original prayer as sought for in the petition was to direct

respondent No.1 to grant additional 100% FSI to the petitioners as provided by Regulation 33(4) of the Development Control Regulations for Greater Mumbai, 1991. By order dated August 1, 2006, we had directed the respondent No.1, to dispose of the petitioners' application within two weeks. On 18th August, 2006, further time was sought which was given up to 31st August, 2006. For non-compliance of the orders, by order dated 31st August, 2006, show-cause notice was issued to the Principal Secretary, Urban Development Department as to why action in contempt should not be taken whereupon, the impugned order came to be passed. The petitioners have subsequently amended the petition to challenge the said order dated 8th September, 2006 on various grounds.

4. For the purpose of considering, the issues involved in the petition, we may gainfully refer to Regulation 33(4) of the D.C. Regulations which reads as under:-

> "Building of Starred Category Residential Hotels:- With the previous approval of Government and subject to payment of such premium as may be fixed by Government (out of which 50 percent shall be payable to the Corporation), and subject to such other terms and conditions as it may specify, the floor space indices in Table 14 may be permitted to be exceeded in the case of buildings of all starred category residential hotels in independent plots and under one establishment as approved by the Departmental of Tourism, by a maximum of 50 per cent over the normal permissible floor space index in the F and G Wards of Island City and by a maximum of 100 per cent over the normal permissible floor space index in wards of the suburbs and extended suburbs.
>
> No condonation in the required open spaces, parking and other requirements as in these Regulations shall be allowed in the case of grant of such additional

floor space index.

[Notes- The use of TDR will be permissible in case of starred category residential hotels in suburbs and extended suburbs only over and above additional FSI granted under these Regulations subject to following conditions:-

(i) Additional floor area to the extent of 0.5 FSI by way of utilization of TDR (reservation TDR, road TDR or slum TDR) will be permitted over and above the additional FSI granted in this Regulations, provided overall FSI does not exceed 2.5.

(ii) Such additional FSI (in the form of TDR) will be permitted only if additional FSI is availed under this Regulations.

(iii) Loading of TDR will be governed by the prescriptions contained in these Regulations]"

We may also reproduce Regulation 52(8)(viii)(vii) which reads as under:-

"(8) Uses permitted in independent premises/buildings in the Residential Zone with Shop Line (R-2 Zone) :- The following uses may be permitted in independent premises/buildings/plots 3 in the R-2 Zone:-

(vii) Residential hotels or lodging houses in independent buildings or parts of buildings or on upper floors thereof with special written permission of the Commissioner, who will take into account the suitability of the size and shape of the plot, the means of access, water and sanitary arrangements etc. before granting the permission. The Commissioner shall not permit such use unless he is satisfied about the provision of these arrangements:

Provided that residential hotels of 4 and 5 star categories may be allowed only in an independent plot of size not less than 2,500 sq.m. And on roads of 18 m. width or more, a hotel of lower star category being also allowed on a separate floor of a premises

or a building with separate access:

Provided further that development of residential hotels of the star categories shall be permitted by the Commissioner, only after due approval by Committee consisting of the Commissioner, the Metropolitan Commissioner, Mumbai Metropolitan Region Development Authority, the Commissioner of Police (Law, Order and Traffic) and the Managing Director, Maharashtra Tourism Development Corporation Ltd."

5. On behalf of the petitioners, the principal contention which has been urged is that, on a proper reading of Development Control Regulation No.33(4), it becomes very clear that in exercising its power to grant previous approval, the Government has to apply its mind to the following factors:-

(a) Whether the subject hotel is a star category residential hotel;

(b) Whether the subject hotel is situate on the independent plot;

(c) Whether the subject hotel is under one establishment; and

(d) Whether the subject hotel is approved by the Department of Tourism.

It is submitted that if the aforesaid conditions are satisfied, than the State Government is bound to grant additional FSI though subject to some relevant conditions as may be specified in the order. In the instant case, it is submitted that the aforesaid factors are found in favour of the petitioners. The State Government therefore has no power to withhold approval. The question of approval by the State Government arises only after the Planning Authority has applied its mind and comes to the conclusion that the building plans are in accordance with the DC Regulation and the

applicant is entitled to get F.S.I. of two. If the petitioner/applicant has complied with the requirements of the four factors set out earlier, the State Government has absolutely no power whatsoever to withhold its approval on any other ground.

It is next submitted that the order has been passed with malafide intention and individious discrimination of the petitioners. On the reference made by the Government vide their letter dated 19.6.2004, the Deputy Director, Town Planning recorded by letter 6th August, 2004 recorded that there was no objection in sanctioning the additional FSI for hotel upto the limit of FSI of 2 under Regulation 33(4) of the Development Control Regulation. Also the Municipal Corporation in response to the Government letter dated 19th June, 2004 by its letter dated 29th January, 2005 addressed to the Under Secretary, Government of Maharashtra interalia stated that the said hotel was entitled for grant of additional FSI. This was informed to the Architect of the petitioners by the Executive Engineer (Building Proposal) by letter dated 8th February, 2005. Inspite of the favourable response, the State Government did not act on the matter, causing tremendous loss to the petitioners to the tune of crores of rupees. After the orders of this court dated 1st August, and 18th August, 2006, the State Government intimated to the Municipal Commissioner, that the grant of additional FSI would require consideration of traffic problem and problem that may be created by the additional rooms and therefore, the request of additional FSI could not be considered at that stage unless the queries raised are properly justified. Subsequent to the order of this court on 31st August, 2006, the requirement of additional rooms was given a go bye and the refusal was based solely on the ground of alleged report of MMRDA dated 7th September, 2006 based on data collected by MMRDA in 2003.

Malafides, it is submitted, are writ large on the face of the record.

6. The rejection on the ground of traffic congestion, is based on the report of MMRDA which authority it is submitted has no concern, either under the MMRDA Act or under the MRTP Act and is, thus, totally irrelevant and extraneous under the Development Control Regulation 33(4). It is submitted that the hotel guests, normally come from the Airport, that is those who arrive at the domestic airport. The consideration that traffic coming from south/north Bombay and going to the airport would create traffic problem, was not relevant. Even otherwise, such a consideration was not taken while granting additional FSI to other hotels particularly to hotel Orchid which is 100 meters away from the subject hotel and situate on a very narrow road and is adjoining the airport.

7. It is lastly submitted that at the time of granting approval to various other five star hotels in the vicinity, the criteria of traffic volume or the traffic volume study carried out by the MMRDA was not considered nor were such hotel subjected to the process of the report from MMRDA. The conduct of the State in so doing discloses discrimination based on the mandate of Article 14. It is also contended that at the Santacruz Airport junction where the hotel is situated, a tender has been approved at the cost of Rs.33 crores for construction of a flyover. The timing for construction was 18 months. If the petitioners' proposal is sanctioned, the petitioners would require about 18 months to complete their project and as such, the question of any congestion of traffic at the junction would no longer subsist.

8. On the other hand, on behalf of the respondent No.1, it is

submitted that the attempt by the petitioners is to seek regularisation of a totally illegal construction. The petitioners, it is contended, carried out a wholly illegal and unauthorised construction and by this petition, are seeking ex post facto regularisation of the unauthorised structure. It is next submitted that the contentions on the scope of power of the State Government under the Development Control Regulation 33(4) is wholly erroneous and misconceived. The argument it is submitted is contrary to the plain language of Development Control Regulation 33 and against the scheme and object of the MRTP Act and the Development Control Regulations. Development Control Regulation 33(4) uses the expression “may”. It is in marked distinction with the word “shall” in Development Control Regulation 33(5), 33(6), 33(7), 33(8), 33(9), 33(13), 33(17) etc. It is well settled that in appropriate cases the word “shall” is to be understood as “may”. To treat “may” in DCR 33(4) as imposing a compulsion, is to give the words of DCR 33(4) a meaning contrary to the language and intent of DCR 33(4). It is next submitted that the impugned order is legal and correct and the respondents have denied the allegations of malafide, extraneous consideration as also individous discretion and other contentions. In so far as the allegation of discrimination, it is submitted that no other hotel is situated/located next to the Airport and/or on the main narrow thoroughfare leading to the airport. The closest other hotel is Orchid is much further away and the permission granted for the year 1992 and has two exits whereas the petitioners' plot is a stone's throw from both terminals and almost touches the circle where several access roads meet. The petitioners' application, therefore, involved unique and/or peculiar and/or individual consideration. Consideration of traffic congestion on the main access road to both terminals, safety and security are of legitimate

consideration. In so far as the flyover is concerned, it is submitted that no flyover to the airport is proposed and the decision/order is based on the problems to persons going to and coming from the airport and therefore, North-South flyover will not, in any way reduce vehicular density to and from the airport. The various approvals and permissions granted by various departments, it is submitted, do not deal with the aspect of traffic congestion. The order has been passed after considering the expert views of both, the Chief (transport and Communication) of the MMRDA which is an expert planning body and the Joint Police Commissioner (Traffic) and the Police Commissioner, Mumbai. For all these aforesaid reasons, it is submitted that there is no merit in the petition which has to be rejected.

9. Considering the above contentions, the main issues which are required to be considered for deciding the controversy are; (i) whether regulation 33(4) has to be construed in a manner sought to be advanced on behalf of the petitioners by restricting it to the four factors or predicates or whether it is open to the Government in exercising its discretion, to consider other factors relevant to the grant or non-grant of approval; (ii) whether the communication dated 8.9.2006 is based on relevant material and/or the Government has ignored relevant material before forming its opinion, and to that extent, the decision discloses non-application of mind on the part of the respondent No.1 and or the decision suffers from illegality or procedural impropriety; (iii) Have the petitioners been able to establish that the action of the respondents is malafide and arbitrary and consequently, requires to be set aside being null and void.

10. For the purpose of deciding the controversy, we may address

ourselves to some facts which may be necessary for deciding the issue. It is the case of the petitioners that respondent No.2-Municipal Corporation of Greater Mumbai (hereinafter referred to as the "Corporation") had issued intimation of disposal (IOD) dated 15th January, 2004 under section 346 of the MMC Act in the matter of additions and alterations to the existing hotel building. The first commencement certificate was issued by the respondent No.2 on 29th March, 2004 under the provisions of MRTP Act. On 9th August, 2004, the respondent No.2 granted no objection to carry out the work as per amended plan submitted by the Architect vide his letter dated 2nd August, 2004 for additions and alterations for ground plus service floor plus first to 5th upper floors with the dome. The respondent No.3 also granted commencement certificate in favour of the respondent No.1 for the amended plans. Pursuant to the approval granted by respondent No.2 to carry out the additions and alterations, by way of the staircase premium and lay-out fees, the petitioners have invested an amount of Rs.5,32,25,199/-.

The petitioners' architect by letter dated 4th November, 2003 and reminder dated 11th June, 2004, sought permission for grant of additional FSI under Regulation 33(4) from Respondent No.1. Pursuant to that letter, the Additional Secretary, Urban Development Ministry of the Government of Maharashtra vide letter dated 19.6.2004 addressed to the Chief Engineer (Development Planning) of respondent No.2 and the Deputy Director of City Planning, Greater Mumbai, were requested to submit a detailed report in the matter of grant of additional FSI by petitioner No.1. The Deputy Director of Town Planning vide letter dated 6th August, 2004 intimated to respondent No.1, that the said plot is covered under Commercial Zone (C II) of the Town Planning Scheme and is not reserved for any purpose and petitioner No.1 was eligible for

the benefit of FSI 2 as they have complied with all requirements of Regulation 33(4) and there was no objection to grant additional FSI as amended by the petitioner No.1. The Chief Engineer (DP) of the respondent No.2 vide his letter of 29th January, 2005 intimated to the Secretary, Urban Development Ministry that the plans submitted by the petitioners' architect are scrutinised and found to be approvable under the provisions of Regulation 33(4) of the Development Control Regulations after granting relaxation in the provisions of Development Control Regulations. It was also intimated that the revised plans for additional construction has been submitted and that the hotel building abuts the road on all four sides and there is no deficiency in the open space and adequate car parking has been proposed as per DC Regulation 36 and as such requested the respondent No.1 to grant additional FSI, over and above the permissible FSI of one. By communication dated 8th February, 2005, the petitioners were informed by the Executive Engineer (Development Plan) of the respondent No.2, that concession for granting additional FSI has been approved by respondent No.3 and the matter has been referred to the Government to grant additional FSI. Pursuant to the issuance of the notices under section 354A of the MMC Act and under section 53(1) of the MRTP Act, dated 20th April, 2005 and 29th April, 2005 respectively, the petitioners have stopped the work of development.

11. From the pleadings and material on record, it is clear that the Department of Tourism, Government of India by letter dated 26.9.2003 had conveyed the approval for putting up 353 rooms in their five-star hotel. Thus, the petitioners have met with the two requisite requirement of Regulation 33(4). The Airport Authority of India who has leased the land, have granted their approval by their communication of 9.11.2004. The drawings had been examined

keeping in view the Airport Authority of India Manual of Construction Guidelines as approved by AAI Board. This is an independent plot and there is no dispute that it is under one management. The other two factors therefore are also satisfied. The Joint Commissioner of Police (Traffic) by his communication of 16.3.2004 addressed to the Commissioner of Police from the point of traffic control gave no objection subject to what is set out therein. We may only refer to part of the letter which reads as under:

> "With reference to above subject applicant has proposed to convert the existing hotel building having ground floor (part basement) + 5 upper floors into 3 basement + ground floor + 5 upper floor structure. The applicant also proposed to provide 627 nos. of parking spaces (209 on each basement) against the required 422 nos. of parking spaces as per D.C.R....."

Pursuant to this communication, the Commissioner of Police addressed a letter to the Municipal Commissioner that there was no objection from the police point of view to the abovementioned proposed additions and alterations to the existing building of Sahara Hospitality Limited on fulfillment of the conditions set out therein. In response to the letter from Respondent No.1, pursuant to the application for approval sought by the petitioners, the Deputy Director, Town Planning of Respondent No.2 by the letter of 6th August, 2004 and the Chief Engineer (DP) by letter of 29th January, 2005 informed the Respondent No.1 that the petitioner was eligible for the benefit and that the plans could be approved.

13. After this court had issued directions to the respondent No.1 to decide the matter, the respondent No.1 wrote to respondent No.3 setting out that the land under reference is situated at the junction of Express Highway and a narrow road leading to Airport and is

situated very close to Airport itself. The grant of additional FSI to Hotel Sahara Star would add additional number of vehicles in the vicinity of airport, which may create traffic problems. A proper study of traffic congestion and its movement therefore needs to be studied. Besides, there are many five star category hotels as well as other hotels in the vicinity of airport. The need for additional rooms in the vicinity needs to be ascertained from the competent authority and in view of that, the request could not be considered unless the above mentioned details are properly justified. The earlier information sought and which was given was totally ignored. Secondly, we cannot appreciate how the State Government could go into the need for additional rooms as the relevant body of the Government of India had already granted approval and which was made known to the respondent No.1. Subsequent to the order of this court dated 31st August, 2006, the respondent No.1 appears to have addressed a letter dated 4th September, 2006 to MMRDA as also the Commissioner of Police. MMRDA sent a communication on 7th September, 2006. It was set out therein that under MUIP, a flyover has been already proposed at the said junction taking into consideration the large delays at the location on account of increase on the Western Express Highway. The current peak hour traffic volume at the junction is 18,298 PCU's out of which 2525 PCU's (nearly 15%) are in the direction from Western Express Highway coming from south turning right to airport using the road next to hotel Sahara Star. The road to airport from Western Express Highway is of 19 meters width with only 2 lane dual carriageway with a central median of 1 mtr. The road on the rear side of the hotel Sahara Star is only 11 mtr. Operating as one-way road. The ultimate carrying capacity of approach to airport for a 2 lane carriageway is 2400 PCUs/hour whereas traffic entering the airport is around 2200 PCUs/hour in peak hour and is operating at leval of

service `E' (Volume/Capacity ratio of 0.91 during peak hours) which is below the desirable leval of service of `C'. Further the junction is having no service roads along the highway in this section. Some proposals were considered but found not feasible and as such, it will not be desirable to consider the request of the petitioners.

The Joint Commissioner of Police addressed a letter on 8th September, 2006 to the Under Secretary to the Government of Maharashtra, Urban Development Department in which it was set out that the ongoing project of hotel Sahara Star has been given NOC by Traffic Control Branch for reasons of (i) parking provision had been made for 627 nos. as against the requirement of 422 nos. as per D.C. Rules; (ii) as per the approval issued by the Deputy Chief Engineer, Traffic & Co-ordination, MCGM, the parking arrangements and internal drive ways are efficient in terms of traffic operations and maneuvering and as a consequence vehicles will not be required to halt at entry points; (iii) existing roads adjacent to hotel Sahara Star are capable of bearing segregated flow of traffic generated by hotel Sahara Star. Besides the said project includes widening of Nehru Road by a lane, as per MCGM plans. It was further mentioned that as far as expansion of Santacruz Domestic Airport is concerned, they were of the view that widening of access roads would be inevitable.. The attention was also invited to the proposal of a flyover (north-south). The Joint Commissioner of Police (L & O) by his letter dated 8th September, 2006, addressed to the Principal Secretary, Urban Development Department, in so far as security concern, set out that the additional FSI should be granted in such a way that the expansion of hotel Sahara Star will not further congest the already narrow access road. After expansion, ample parking space should be provided. The vertical expansion if granted beyond a certain limit, may cause a serious

security concern with respect to the safety of domestic airport.

14. By the impugned order, the petitioners have been informed that the approval cannot be granted considering the existing site constraints such as narrow approach roads to the airport and as the domestic airport has been expanded and there is limited scope for the widening of the roads leading to the airport and as such it would not be desirable to allow the petitioner, the use of additional F.S.I..

15. We may now consider the first contention. The learned counsel for the petitioners has cited the dictionary meaning of the word “approval” as also judgments, which we shall first consider. In Supreme Court, words and phrases by Justice R.P. Sethi, “approval” has been set out as under:

> “Black's Law Dictionary, 6th Edition, defines “approval” to mean an act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. In the context of an administration act, the, word, “approval” in our opinion does not mean anything more than confirming, ratifying, assenting, sanctioning or consenting. Vijayadevi Navalkishore Bhartia and another v. Land Acquisition Officer and another (2003) 5 SCC 83.”

The Supreme Court was considering expression “approval” under the U.P. Industrial Disputes Act, 1947 in ***Lord Krishna Textile Mills and its workmen, 1961 LLJ 211.*** Dealing with the expression “approval”, the Court noted, “Approval” according to its dictionary meaning suggests, that what has to be approved has already taken place; it is in the nature of ratification of what has already happened or taken place. The word “approval” in contrast with the words “previous permission” shows that the action is taken

first and approval obtained afterward. In ***Ashok Kumar Sahu v. Union of India and others, (2006)6 SCC 704,*** the expression "approval" again came up for consideration in the context of approval to a voluntary retirement of a member of the Indian Police service. In para 18, the court observed as under:-

> "18. The expression "approval" presupposes an existing order. "Acceptance" means communicated acceptance. A distinction exists between the expressions "approval" and "acceptance". Whereas in the latter, an application of mind on the part of the competent authority is sine qua non, approval of an order only envisages statutory entitlement. Approval of an order is required as directed by the statute. It can be given a retrospective effect. Even valid contract comes into being only after the offer is accepted and communicated. Where services of an employee are dispensed with, the order takes effect from the date when it is communicated and not from the date of passing of the order. (See State of Punjab v. Amar Singh Harika.)"

Reference was also made to the judgment in Vijayadevi Navalkishore Bhartia and another v. Land Acquisition Officer and another, (2003) 5 SCC 83. The meaning of the word "approval" has already been set out while considering Supreme Court `On Words and Phrases'. On the consideration of the language of Regulation 34(4), it would not be possible to accept even considering how the expression "approval" has been understood that the respondent-State has only to apply its mind only to the four factors alleged as relevant by the petitioners. In our opinion, that would not be a true construction considering the language used in the regulation. Every legislation has to be read in the context of the language used. No doubt, in the instant case, we have to consider the fact that we are dealing with a subordinate legislation. The approval here is to for the use of additional F.S.I. on the plot by the plot holder. For the

State to consider the approval, the petitioner must satisfy, that it is a star hotel; has an independent plot; under one establishment and approved by the Department of Tourism. Once these factors are satisfied and which here are satisfied, the Government has still to consider grant of approval, subject to such terms and conditions. The regulation permits use of additional FSI from the very same plot and apart from that, TDR to the additional extent of 0.5 F.S.I. is permissible only over and above that if the additional FSI from the same plot is used. This is an indication that normally approval should be granted. For use of such FSI, premium is to be paid which will be shared by the Government and the Corporation. The bar of use of additional TDR has to be considered in that context, as TDR is to be purchased from the market from private parties to be loaded on an existing plot. The language of the regulation does not support the contention of the petitioners that only when the Planning Authority is satisfied that the building plans confirm to the regulation, then only the issue of approval by the Government arises for consideration. The approval is not for the building plans but for use of additional FSI, which can be considered if the four factors are satisfied.

At this stage, we may take note of D.C. Regulations 33 to 34 and Appendix VII. By virtue of these regulations, FSI over and above one, to the extent of FSI of two and above can be used on any plot as set out therein subject to what is set out therein. If a person wants to construct a hospital or educational institution, they would be entitled to use of additional FSI of one without Government approval and with Government approval for medical institution on independent plots could be further exceeded by 200% over and above additional FSI. The petitioners' plot is situated in the suburbs where Regulation 34, Appendix VII is applicable. That

permits use of additional FSI on plots in the suburbs without any Government permission or consideration of traffic problems. If, therefore, the petitioners wanted to construct any building other than the hotel, they would have been entitled to use of additional FSI of one, irrespective of traffic flow or volume. We may note that while preparing the development plan and considering section 28 of the MRTP Act, what must be taken into consideration amongst others under section 22(d), is the transport and communication such as roads, highways, path ways, railways, water ways, canals and airports including the extension and development; in other words, D.P. Plans and D.C. Regulations are framed considering section 22. The authority conferred with the power of making subordinate legislation, has to consider the mandate of section 22 of the MRTP Act. The D.C. Regulations are subordinate legislation made after the delegate is satisfied that the requirements of Section 22(d) are met. The regulations require to be approved by the Government and have been approved. The requirement of infrastructure of roads, transport and communication have already been taken into consideration when the D.C. Regulations were approved by the Government.

Apart from that, the Planning Authority for the relevant area is respondent No.2. In the matter of development, therefore, it is respondent No.2 whose expertise has to be considered while granting or sanctioning the development, considering the various factors including the provisions of section 22 of the M.R.T.P. Act, which it considered while preparing the D.P. Plan and the regulations. In other words, the body principally concerned with the planned development in the area is the Planning Authority for that area. The opinion, therefore, of the Planning Authority in the context of traffic, road congestion, has to be considered whilst

considering the grant of approval. The Traffic Police in their communication to Respondent No.2 has found no problem if the sanction for development is granted. This was also informed to Respondent No.1 by Joint Commissioner of Police by letter dated 8th September, 2006. That authority had already given their no objection considering relevant material and the regulations after its opinion was sought.

We may now examine regulation 52(8)(viii)(vii). This regulation, in our opinion, has nothing to do with the approval of additional FSI but only requires that in the matter of development permission for a starred Hotel by a committee, of which the Metropolitan Commissioner, Mumbai Metropolitan Region Development Authority is one of the members. Under this Regulation, all that happens is that Hotels are permitted in a residential zone with shopline. In the instant case, assuming that it was open to respondent No.1 to consult MMRDA on the issue of traffic pattern, it could not be bypassing the Planning Authority or its opinion when for the area in question, there is a Planning Authority. So construed, in our opinion, the approval or non-approval cannot be contrary to the D.P. Plan and D.C. Regulations. The previous approval is for the purpose apart from satisfying the mandatory predicates of the regulation itself to some factors which may not have been considered at the time of framing the the development plan including regulations made under section 22 which are relevant from the planning point of view. Matters which have to be considered whilst granting approval cannot be those which have already been considered, considering the provisions of section 22 of the MRTP Act. If we construe the regulation to mean that the respondent No.1 after notifying that the D.P. Plan and approving the D.C. Regulation, reserved to itself the right to refuse permission on

account of traffic congestion then that would be contrary to regulation 33(4), as that aspect was taken into consideration when this regulation was made. We are clearly, therefore, of the opinion that although while granting approval for use of additional FSI, the four factors argued on behalf of the petitioners have to be considered, it is also open to respondent No.1 to consider other relevant material which, however, will not be what has already been considered by the D.P. Plan and the Regulations. Additionally once on the very same plot if a building can come up, in the ordinary course by user of FSI of two or for that matter also a hospital or college with the same FSI of two without approval of the Government factors like traffic congestion are really not relevant for granting approval under Regulation 33(4).

16. We may now deal with the second aspect in the context of non-application of mind and or ignoring relevant material. We had called for the files of the respondent No.1 to examine as to what was the material considered. We have noted earlier, the application by the petitioners was of November 4, 2003 with the reminder of 11th June, 2004. Pursuant to this letter, the Government had sought information from the Chief Engineer (Development Planning) and the Deputy Director (City Planning). Both these authorities had granted their no objection for the sanction. This material has not at all been considered. It was not open to the respondent No.1 to ignore the material which had become available at its insistence. Even in so far as the additional material is concerned, the only information received is letter of MMRDA of 7th September, 2006 before the decision making process of 8th September, 2006. The material that has come on record shows that peak hour traffic volume is 18298 PCU's out of which 2525 PCU's (nearly 15%) are coming from the Express Highway to the Airport. A flyover is

already under construction which will result in the major traffic being diverted over the flyover, thus, causing less congestion at the junction. In so far as access to the airport is concerned, we have the letter of 8.9.2006 of the Joint Commissioner of Police (Traffic), Mumbai. From that, it is clear that in so far as traffic flow is concerned, there was absolutely no objection. Attention was invited to the NOC given by the Traffic Control Branch by letter of 16.3.2005. The Joint Commissioner of Police (Traffic) by that letter considering the additional construction gave his no objection based upon which the Commissioner of Police informed the Municipal Commissioner of their no objection. The letter of Joint Commissioner of Police (L&O) dated 8th September, in our opinion, is not relevant, considering that in so far as height is concerned, in terms of the rules in force there are hight restrictions for the buildings near the Airport and the Airport Authority itself has granted approval. It is based on all these factors that respondent No.2 had communicated their decision to respondent No.1. In our opinion, respondent No.1 while considering the issue has ignored the relevant material whilst forming its opinion. An administrative authority deciding the question has to consider all the relevant material. The action, therefore, in our opinion, suffers from both, illegality as well as procedural impropriety. The impugned order, therefore, is liable to be set aside on this count also.

17. In so far as granting permission to other hotels, there is no sufficient material placed by the petitioners that there are other hotels similarly situated near the airport except “Orchid” for which the approval was granted in the year 1992. In our opinion, there is no sufficient material placed on record to consider the said contention and in the absence of such material we are of the opinion that the petitioners have failed to demonstrate arbitrariness

on the part of the respondent No.1.That contention must, therefore, be rejected.

18. Having said so, the question is, what reliefs are the petitioners entitled to. Granting of approval is within the discretion of respondent No.1. This exercise of administrative discretion normally, should not be exercised by a court exercising its extraordinary jurisdiction under Article 226 of the Contention of India, even if the court comes to the conclusion that there is unfairness in the exercise of the discretion. Law on judicial review of administrative action may now be considered. In ***Council of Civil Service Unions v. Minister for the Civil Service Lord Diplock*** set out the three relevant grounds which are (i) illegality; (ii) irrationality and (iii) procedural impropriety. Explaining the three grounds, the learned Judge observed as under:-

> "By "illegality" he means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it, and whether he has or has not, is a justiciable question; by "irrationality" he means "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it; and by "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

In Rameshwar Prasad (VI) v. Union of India, (2006)2 SCC 166, the Supreme Court was pleased to observe as under:-

> "240. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.
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> 241. It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

19. From the law as now examined, it would be clear that the order of respondent No.1 suffers from illegality and procedural impropriety. However, judicial review is not concerned with reviewing the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. The court, therefore, should not under the guise of preventing the abuse of power, be itself guilty of usurping power. See Tata Cellular v. Union of India (1994)7 SCC 651. In our opinion, on the facts of the case, the matter will have to be remitted back to respondent No.1 for re-consideration in terms of what we have discussed in the judgment.

In the light of that, rule is made absolute in terms of prayer clause (a). The matter is remitted back to the respondent No.1 for re-consideration according to law. Considering that the application is pending since March, 2004, in our opinion, the ends of justice would be met if the respondent No.1 is called upon to decide the same at any rate not later than 60 days from today. Rule to the extent made partly absolute. There shall be no order as to costs.

(F.I. REBELLO, J.)

(ANOOP V. MOHTA J.)